The case is opposed to the English decisions cited above, and seems an extreme holding, as there is no proof of any causal connection between the injury and the conditions under which the work was to be performed. The judge in the principal case attempts to distinguish this New Jersey holding from the case in hand. He bases his distinction on the fact that the floor where the injury occurred was improperly constructed. In any case, this was only the remote cause of the accident, the act of the fellow employee being the proximate cause, and as the proximate and not the remote cause governs, the distinction is without foundation.

The two cases are clearly in conflict, and although the New Jersey holding appeals to the sympathies, yet it must be admitted that it places an undue burden on the employer and one for which there is no legal justification. The principal case seems to express the better and more logical rule.

H. L. B.

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IS A MEMORANDUM ADMISSABLE TO CORROBORATE A WITNESS' ORAL TESTIMONY WHEN IT IS NOT NECESSARY TO REFRESH HIS RECOLLECTION?—In a recent Vermont case—*Taplin & Rowell* v. *Clark*, 95 Atl. 491—after two witnesses had testified as to the items included in a sale, the plaintiff introduced (in one case over, and in the other without, the objection of the defendant) memoranda as to which the witnesses testified that they were made by them at the time of the sale, that they were correct, and that they did not refresh their memories. The court held that the memoranda were properly received as auxiliary to, or confirmatory of, the evidence of the witnesses.

While the holding of the Vermont court in this case is undoubtedly in accord with its previous holdings in *Lapham* v. *Kelly*, 35 Vt. 195, *Cheney* v. *Town of Ryegate*, 55 Vt. 499, and *Stillwell* v. *Farewell*, 64 Vt. 286, there is some question as to whether it is in accord with the weight of authority, and whether it is the better view.

A memorandum such as was introduced in the instant case is not evidence *per se*, for it is merely written hearsay, and is, therefore, within the principle of the hearsay rule. CHAMBERLAYNE, § 2756. Nor is this proposition controverted by the Vermont court. *Vide, Lapham* v. *Kelly* and *Stillwell* v. *Farewell, supra.*

Nevertheless, it is now a well-established rule that, when a witness testifies that he made a memorandum at a time when he had knowledge of the facts therein contained, and that it is correct, this memorandum becomes evidence as the embodiment of his testimony, even though it in no way serves to recall to his mind the facts which were once there. WIGMORE, § 754. This may be regarded as an exception to the hearsay rule based upon the necessity of the case. The admission of the memorandum in evidence is, however, accompanied by a guarantee of its trustworthiness which, together with the necessity of the case, form a basis for most of the various hearsay exceptions.

It is an equally well-established rule that a witness may use a writing to refresh his present hazy recollection, upon a showing that a reference to

the writing in question will have such a tendency; but in such case, the general rule is that the writing is not admissible in evidence to corroborate his testimony. WIGMORE, § 763. The reason underlying the refusal to admit the writing in evidence when it is used merely as an aid to the memory of the witness would seem to be indicated either in the nature of the writing itself or in the absence of the element of necessity. The writing need not be of such a nature that it would be admissible as evidence of the facts it asserts if it did not refresh the witness' recollection; and if it is not, it should not be admissible. And the courts generally further hold that even though the memorandum fulfills all of these requirements, the evidence of the facts therein contained having been obtained from the witness' oral testimony, there is no necessity for the admission of the memorandum. The Vermont court is, however, in this respect consistent with its holding in the principal case and admits the memorandum for the purpose of confirming the oral testimony of the witness. *Lapham* v. *Kelly, supra.* In the instant case, that court has merely taken the next logical step in holding the memorandum admissible independent of the fact as to whether or not it refreshes the witness' memory. Those courts which hold the memorandum inadmissible when used to refresh the present hazy recollection of the witness, *a fortiori,* would exclude it as clearly within the principle of the hearsay rule where it is not necessary for that purpose—*i.e.,* under the circumstances of the instant case.

It remains to be considered whether any argument based upon principle and reason can be made to sustain the holding of the Vermont court. The exclusion of the memorandum is based upon the hearsay rule. The objection offered by the hearsay rule would, however, seem to be met by the requirements of the Vermont court, for it must be shown that the memorandum was made by the proper person, with the proper knowledge, at the proper time, and it must be guaranteed by him under oath and he can be examined as to the truth of the facts therein embodied, whereas he cannot be in the case where he has no present recollection, in which case the memorandum is admissible. And it would further seem that the writing under these circumstances would be better evidence of the facts contained therein than the mere uncorroborated account of the witness based upon an independent present recollection of those facts which lie in his mind more or less hazily and dimmed by lapse of time, and it ought to be admissible in evidence in confirmation of that account. Surely in every-day affairs the average person would give to it more weight and consider it as worthy of greater consideration. *Contra, Wightman* v. *Overhiser,* 8 Daly (N. Y.) 282.

W. F. W.

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JURISDICTION OVER NON-RESIDENT DEFENDANT.—While judicial inability to comprehend the rationale of a given authoritative pronouncement is not exactly uncommon, it is rarely that so glaring an illustration of it is encountered as in a case recently decided by the District Court of the United States for the Northern District of California, Second Division. The case, which